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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Steven Ray Newell,
10 Petitioner,

11 v.

12 Charles L Ryan, et al.,
13 Respondents.

No. CV-12-02038-PHX-JJT
DEATH PENALTY CASE

ORDER

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15 Before the Court is Petitioner Steven Ray Newell's Motion for Temporary Stay
16 and Abeyance and to Legally Represent Petitioner in State Court Proceedings. (Doc. 72.)
17 Newell asks the Court to stay and hold his case in abeyance while he pursues state court
18 relief under *Lynch v. Arizona*, 136 S. Ct. 1818 (2016) (per curiam). He also seeks
19 permission for his federal habeas counsel to appear on his behalf in state court.
20 Respondents filed a response in opposition. (Doc. 73.) For the reasons set forth below,
21 the motion is denied.

22 **BACKGROUND**

23 In 2001, Newell sexually assaulted and murdered an eight-year-old girl. A jury
24 convicted him of first-degree murder, sexual conduct with a minor, and kidnapping. He
25 was sentenced to death on the first-degree murder conviction. The Arizona Supreme
26 Court affirmed the convictions and sentences. *State v. Newell*, 212 Ariz. 389, 132 P.3d
27 833 (2006). After unsuccessfully pursuing post-conviction relief, Newell filed a petition
28 for writ of habeas corpus in this Court. (Doc. 38.) In Claim 25 of his habeas petition,

1 Newell alleges that the trial court violated his due process rights by instructing the jury
2 that if it did not sentence Newell to death, he could be sentenced to life with the
3 possibility of parole after 35 years when, in fact, the earliest possibility of parole would
4 have been after 58 years. (*Id.* at 183–84.) Newell did not raise this claim in state court,
5 and in Claim 26 he alleges that appellate counsel performed ineffectively in failing to do
6 so. (*Id.* at 186.) Newell asks the Court to stay the case so that he can return to state court
7 to raise these allegations.

8 ANALYSIS

9 When a petitioner has an available remedy in state court that he has not
10 procedurally defaulted, it is appropriate for the federal court to stay the habeas
11 proceedings if (1) there was good cause for the petitioner’s failure to exhaust his claims
12 first in state court, (2) his unexhausted claims are potentially meritorious, and (3) there is
13 no indication that he engaged in intentionally dilatory litigation tactics. *See Rhines v.*
14 *Weber*, 544 U.S. 269, 277 (2005).

15 Newell contends that under Rule 32.1(g) of the Arizona Rules of Criminal
16 Procedure, the United States Supreme Court’s recent decision in *Lynch* provides an
17 available remedy in state court. Rule 32.1(g) provides that a defendant may file a petition
18 for post-conviction relief on the ground that “[t]here has been a significant change in the
19 law that if determined to apply to defendant’s case would probably overturn the
20 defendant’s conviction or sentence.” Ariz. R. Crim. P. 32.1(g).

21 Arizona courts have described a significant change in the law as a “transformative
22 event,” *State v. Shrum*, 220 Ariz. 115, 118, 203 P.3d 1175, 1178 (2009), and a “clear
23 break” or “sharp break” with the past. *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41,
24 49 (1991). “The archetype of such a change occurs when an appellate court overrules
25 previously binding case law.” *Shrum*, 220 Ariz. at 118, 203 P.3d at 1178. A statutory or
26 constitutional amendment representing a definite break from prior law can also constitute
27 a significant change in the law. *Id.* at 119, 203 P.3d at 1179; *see State v. Werderman*, 237
28 Ariz. 342, 343, 350 P.3d 846, 847 (App. 2015).

1 In *Lynch*, 136 S. Ct. 1818, the Supreme Court applied *Simmons v. South Carolina*,
2 512 U.S. 154 (1994), to a capital sentencing in Arizona. *Simmons* held that when future
3 dangerousness is an issue in a capital sentencing determination, the defendant has a due
4 process right to require that his sentencing jury be informed of his ineligibility for parole.
5 512 U.S. at 171.

6 In *Lynch*, the defendant was convicted of murder and other crimes. 136 S. Ct. at
7 1818. Before the penalty phase of his trial began, the state successfully moved to prevent
8 his counsel from informing the jury that, if the defendant did not receive a death
9 sentence, he would be sentenced to life in prison without possibility of parole.¹ *Id.* at
10 1819. The jury sentenced him to death. *Id.* On appeal, Lynch argued that, because the
11 state had made his future dangerousness an issue in arguing for the death penalty, the jury
12 should have been given a *Simmons* instruction stating that the only non-capital sentence
13 he could receive under Arizona law was life imprisonment without parole. *Id.* The
14 Arizona Supreme Court affirmed, holding that the failure to give the *Simmons* instruction
15 was not error because the defendant could have received a life sentence that would have
16 made him eligible for release after 25 years—even though any such release would have
17 required executive clemency. *Id.* at 1820.

18 The United States Supreme Court reversed. *Id.* The Court reiterated that under
19 *Simmons* and its progeny, “where a capital defendant’s future dangerousness is at issue,
20 and the only sentencing alternative to death available to the jury is life imprisonment
21 without possibility of parole,” the Due Process Clause “entitles the defendant to inform
22 the jury of [his] parole ineligibility, either by a jury instruction or in arguments by
23 counsel.” *Id.* at 1818 (internal quotations omitted). The Court explained that neither the
24 possibility of executive clemency nor the possibility that state parole statutes will be
25 amended can justify refusing a parole-ineligibility instruction. *Id.* at 1820.

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28 ¹ When Lynch and Newell were tried, Arizona law prevented all felons who
committed offenses after 1993 from obtaining parole. See A.R.S. § 41-1604.09(I).

1 Newell concedes that *Lynch* was not a clear break from the past and did not
2 overturn binding precedent. (Doc. 74 at 2.) Instead, he argues that *Lynch* was a
3 “transformative event . . . for *Arizona law* [because] it explicitly decided that Arizona’s
4 treatment of the *Simmons* issue was contrary to due process.” (*Id.* at 3.) Therefore,
5 according to Newell, “he now has an available state court remedy for the ongoing federal
6 constitutional error, which was not available under *state law* until *Lynch*.” (*Id.*)

7 The Court concludes that *Lynch* does not represent a change in the law. *Lynch*
8 simply applied existing law to an Arizona case. It was not a transformative event of the
9 kind described by Arizona courts in interpreting Rule 32.1(g). In *Shrum*, for example, the
10 Arizona Supreme Court cited *Ring v. Arizona*, 536 U.S. 584 (2002), as a “significant
11 change in the law.” 220 Ariz. at 119, 203 P.3d at 1179. *Ring* “expressly overruled”
12 *Walton v. Arizona*, 497 U.S. 639 (1990). As the Arizona Supreme Court explained,
13 “before *Ring*, a criminal defendant was foreclosed by *Walton* from arguing that he had a
14 right to trial by jury on capital aggravating factors; *Ring* transformed existing Sixth
15 Amendment law to provide for just such a right.” *Shrum*, 220 Ariz. at 119, 203 P.3d at
16 1179.

17 In contrast to the holding in *Ring*, *Lynch* did not transform Arizona law. The
18 holding does not constitute a significant change in law for purposes of Rule 32.1(g).
19 Therefore, Newell does not have an available remedy in state court, and a stay is
20 inappropriate.

21 In addition, Newell’s allegations are not potentially meritorious, as required for
22 the Court to issue a stay under *Rhines*. Newell’s due process rights were not violated. The
23 trial court instructed the jury that if it did not sentence Newell to death, the court would
24 sentence him “either to life imprisonment without the possibility of parole, or life without
25 parole until at least 35 years have passed.” (RT 2/23/04, a.m., at 13; RT 2/24/04 at 50–
26 51.) Newell argues in his habeas petition that the instruction was incorrect because he
27 actually was not eligible for parole for 58 years. (Doc. 38 at 185.) He now argues that he
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1 not was eligible for parole at all and therefore under *Lynch* his due process rights were
2 violated by the trial court's instructions. (*See* Doc.72 at 3.)

3 Under *Lynch* and *Simmons*, due process requires a parole ineligibility instruction
4 only where the state argues that the defendant's future dangerousness militates in favor of
5 the death penalty. *See Lynch*, 136 S. Ct. at 1818. Unlike the prosecutors in *Simmons* and
6 *Lynch*, the State did not make an issue of Newell's future dangerousness by arguing that
7 he would "pose a threat to society in the future." *Simmons*, 512 U.S. at 177. The State did
8 not explicitly argue that the jury should impose a death sentence in order to protect
9 society from Newell. *See id.* at 157 (noting the prosecution introduced evidence that the
10 defendant posed a continuing danger to elderly women and argued the jury should
11 impose the death sentence as an act of "self-defense"). Nor did the prosecutor in Newell's
12 case "accentuate[] the clear implication of future dangerousness raised by the evidence."
13 *Kelly v. South Carolina*, 534 U.S. 246, 255 (2002) (prosecution presented evidence that
14 while in prison, Kelly made a knife, attempted to escape, and planned to hold a female
15 guard as a hostage, as well as evidence of "Kelly's sadism at an early age, and his
16 inclination to kill anyone who rubbed him the wrong way.").

17 Newell does not contend that the State presented evidence or argued that he would
18 be dangerous to society if released. Instead, he asserts that the issue of future
19 dangerousness is inherent in all capital sentencings and that the future dangerous element
20 can be met without the prosecutor making any specific argument about the issue. (*See*
21 Doc. 71 at 4–5.) This assertion is not persuasive, and Newell does not support it with
22 relevant case law. The future dangerousness element cannot be met unless the
23 prosecution offers some evidence or argument that a defendant will be a danger if
24 released from prison. *See Kelly*, 534 U.S. at 254 n.4; *see also Moeller v. Weber*, 635 F.
25 Supp. 2d 1036, 1060 (D.S.D. 2009) ("[T]he Supreme Court has not interpreted or
26 extended its holding in *Simmons* . . . to hold that due process requires that a jury in a
27 capital case be advised that a person subject to life imprisonment is ineligible for parole
28 when . . . the State has presented no evidence at the penalty phase and has not at the

1 penalty phase argued future dangerousness.”), *order amended on denial of*
 2 *reconsideration*, No. CIV. 04-4200, 2010 WL 9519011 (D.S.D. Apr. 9, 2010), and *aff’d*,
 3 649 F.3d 839 (8th Cir. 2011).

4 Finally, because there was no due process violation, appellate counsel did not
 5 perform ineffectively in failing to raise such a claim. *See Jones v. Smith*, 231 F.3d 1227,
 6 1239 n. 8 (9th Cir. 2000) (finding no prejudice when appellate counsel fails to raise an
 7 issue on direct appeal that is not grounds for reversal); *Miller v. Kenney*, 882 F.2d 1428,
 8 1434 (9th Cir. 1989) (explaining that appellate counsel remains above an objective
 9 standard of competence and does not cause prejudice when he declines to raise a weak
 10 issue on appeal). Therefore, Newell’s allegation of ineffective assistance of appellate
 11 counsel is not potentially meritorious.

12 CONCLUSION

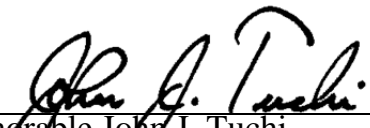
13 Newell is not entitled to a stay. *Lynch* is not a significant change in the law for
 14 purposes of Rule 32.1(g). Newell’s claim of a due process violation based on the
 15 sentencing instructions is not potentially meritorious under *Rhines*.

16 Having determined that Newell is not entitled to a stay to exhaust these
 17 allegations, the Court finds it is not appropriate to authorize the Federal Public
 18 Defender’s Office to represent him in state court. *See Harbison v. Bell*, 556 U.S. 180, 190
 19 n.7 (2009) (“[A] district court may determine on a case-by-case basis that it is appropriate
 20 for federal counsel to exhaust a claim in the course of her federal habeas
 21 representation.”).

22 Accordingly,

23 **IT IS ORDERED** denying Newell’s Motion for Temporary Stay and Abeyance
 24 and to Legally Represent Petitioner in State Court Proceedings. (Doc. 72.)

25 Dated this 20th day of October, 2016.

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 Honorable John J. Tuchi
 United States District Judge